BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 22 of 2008

BETWEEN:

JIPPY JOEL DOYLE ***Appellant***

AND

THE QUEEN ***Respondent***

BEFORE: The Honourable Peter D.H. Williams, the Honourable Sherman R. Moore and the Honourable Sandra P. Mason, Justices of Appeal

2010: 22, 23, 24 and 25 March; 3 May and 14 December

Sir Richard Cheltenham Q.C., Mr. Marlon Gordon and Ms. Shelly-Ann W. Seecharan for the Appellant

Mrs. Donna C.B. Babb-Agard Q.C., Deputy Director of Public Prosecutions and Mr. Elwood Watts, Crown Counsel, for the Respondent

DECISION

PETER WILLIAMS JA

I. INTRODUCTION

[1] The appellant, Pastor Jippy Joel Doyle, is an evangelist. On 31 July 2008, he was convicted of rape of a thirteen year old female member of his church, Dominion Life Centre, located at Haggatt Hall, St. Michael. On 31 October 2008, ***Reifer J*** sentenced him to ten years' imprisonment. The appeal challenges both the verdict of the jury and the sentence imposed by the judge.

II. EVIDENCE

(a) The prosecution case

[2] We recite the evidence to the extent only that it is necessary to dispose of the appeal. On the morning of Saturday 12 May 2001, the day before Mother's Day, the complainant, whose date of birth is 18 December 1987, was at home by herself as her mother went to Bridgetown to purchase items for the upcoming Mother's Day celebrations. While her mother was away, the complainant received a voice message from the appellant to call him and in response she telephoned him and was told to do "something" for him which required her to go to his house. She went. He greeted her clothed only in a towel wrapped around his waist. He then showed her into a room to watch television while he apparently went to take a bath. When he returned he led her into a bedroom and put his hand around her waist and started to kiss her but she pushed him off. He came back unbuttoned and unzipped the complainant's short pants and she "stepped out" of her pants. He took off her panties and used his hands to open her legs. He then removed the towel from around his waist and put his penis inside her vagina. She was crying and she bled. She then went to the

washroom and dressed. He told her that if her mother had returned home to tell her that she had gone to a friend. He gave her $20 and a bag of sweets and she left.

(b) The defence

[3] On 7 September 2001, the appellant was interviewed by the police in connection with the complaint made to them by the complainant's mother. The appellant told the police:

> "I had no sexual relationship with [the complainant] at any time."

The appellant gave extensive evidence on oath and was cross-examined by Mr. Charles Leacock Q.C., Director of Public Prosecutions (DPP), who represented the Crown at the trial. The appellant denied being sexually involved with the complainant. The essence of his position is to be found in an answer that he gave to his counsel, Sir Richard Cheltenham Q.C., at page 335 of the record:

> "I did not see [the complainant] at any time during that day, and I would have left home, as I said, around ten thirtyish to go to my mother's, so I would not have been at my residence. I did not see her. I did not give her any instructions. I had no communication with her whatsoever."

It is important to note in view of the subsequent discussion that the appellant not only denied the charge but put forward a defence of alibi to the effect that it was impossible for him to have committed the offence as alleged by the complainant.

(c) The verdict

[4] The jury returned a unanimous verdict of guilty of rape after deliberating for 2 hours and 17 minutes.

GROUNDS OF APPEAL

[5] On 12 January 2010, the appellant filed amended grounds of appeal which he was granted leave to argue. There were 16 grounds filed and we set out the grounds argued in the order in which submissions were made on them. Grounds 7, 9, 10 and 11 were not pursued.

III. GROUND 5 – ALIBI EVIDENCE

(a) The ground

[6] A summary of the ground is as follows:

> An alibi defence called for careful direction from the judge...she should have analysed the timelines of the prosecutrix relative to the period within which the alleged rape was committed and the timelines of the defence concerning the absence of the accused from his residence. The judge did not help the jury with the alibi evidence of the accused which was misapprehended. The misapprehended evidence might well have gone to the heart of the reasoning process of the jury and prejudiced the defence.

(b) The appellant's submissions

[7] Sir Richard submitted that if the evidence had been properly analysed by the judge it would have disclosed that the appellant had left his home before the complainant was alleged to have gone there and therefore his defence of alibi was credible. Instead, the manner in which the evidence was presented to the jury left a thirty-five minute "window of opportunity" in which the appellant could have raped the complainant. This was a substantive ground of appeal on which the appellant's counsel relied as leading to "the inescapable conclusion" that the appellant could not have been responsible for the offence. We are therefore required to examine this ground in some detail.

[8] The evidence of the complainant was that she left home "around 10:45" and was at the appellant's house "20 to 30 minutes after" or between 11:05 and 11:15 a.m.: page 166 of the record of appeal. P.C. Crishna Graham stated that the complainant reported that she was at the appellant's house between "11:15 and 13:00 hours" and Sgt. Wilma Farley stated that the complainant reported that she was there "between 11:30 and 13:00 hours". We can therefore pin down the complainant's reported time of arrival at the appellant's house to between the time of 11:05 a.m. and 11:30 a.m. on the basis of her own evidence and on what Sgt. Farley and P.C. Graham said that she told them.

[9] This is a convenient point at which to interject that Sir Richard drew our attention to the fact that the judge told the jury at page 646 of the record that "the timeline established for the alleged rape is 11:50 to 1:00". He conceded that 11:50 may have been a typographical error but in any event the 11:50 time was more favourable to the appellant's alibi defence than the time of 11:15 or 11:30 which was given by the police witnesses. There was therefore no prejudice to the appellant.

[10] The appellant's evidence as to when he left his house was the subject of considerable controversy during the trial. The controversy arose from his answer to a question during the examination-in-chief by Sir Richard, which we set out from page 330 of the record as follows:

> "**Sir Richard:** Now on 12 May 2001, do you remember the day?
>
> **[Pastor Doyle]: …**I would have proceeded to my mother, approximately around eleven thirtyish, arriving there just before 11:00 and leaving there approximately 7:00 in the evening.
>
> **Sir Richard**: All right. We will come back to that. Now what was your mother's name?"

It is obvious that the appellant could not have arrived at his mother's house before he left his own. It was not disputed that the evidence quoted above was an accurate record of what the appellant said. There seems to have been a genuine slip on his part and that no issue of credibility arose from the same. Unfortunately, this matter was not dealt with immediately by counsel but allowed to fester. It became an issue at the trial and has been presented as a major ground of appeal.

[11] We know that the "eleven thirtyish" and the "before 11" times were wrong because the appellant later stated that he meant 10.30 instead of 11.30 as the correct time that he left home. He further stated "I would have left home, as I said, around ten thirtyish to go by my mother's". However, the DPP in cross-examination wished to pin him down to the 11:30 time (at page 370 of the record). Doyle denied saying 11:30 but the judge confirmed that her note did record 11:30. The following exchange then took place at page 371:

> "**Sir Richard**: That is my note too, my mental note. And the only reason I didn't deal with it is that he repeatedly returned to 10:30 and getting to her before 11:00, but it did happen.
>
> **The Court**: It will be dealt with, Sir Richard, in terms of the direction because he said it."

[12] The significance, of course, of the timelines is that the appellant wished to show that he had left home by 10:30 before the complainant had come to his house at 11:05 (the earliest time that she alleged). On the other hand the prosecution wished to show that the appellant was still at the house at 11:30 which was the latest time according to the evidence of Sgt. Farley that the complainant said that she arrived at the appellant's house.

[13] Counsel for the appellant impugned the jury's rejection of the alibi defence. He was critical of the judge's failure to precisely analyse the timelines and thereby claimed that the appellant's evidence was not presented in the most favourable light. However, he conceded that the general directions given by the judge in relation to alibi were sound in law.

. ***(c) The respondent's submissions***

[14] Mr. Watts replied to this ground of appeal by supplementing the respondent's skeleton argument with his oral submissions. It was submitted first, that the judge did repeat the evidence on the timelines to the jury and secondly, that if there was any misapprehension by the judge on the timelines, it was inconsequential and should be seen in the light of the principle that not every error and departure from good practice in the course of a trial deprived a defendant of a fair hearing. It was submitted that in the circumstances this ground was without merit.

(d) Discussion

[15] We cannot accept the submissions made on behalf of the appellant. First, the timelines were not exact but approximate times only. Secondly, there was defence evidence on timelines that was at variance with that of the appellant. Thirdly, timelines in the circumstances of this case would not have been decisive in determining the point in issue, namely, whether the appellant was at his home and raped the complainant there. The timelines were therefore merely a factor to be considered in determining whether the offence was committed.

[16] We have stated the appellant's evidence as to his leaving his home at about 10:30 and arriving at his mother's home about 5 to 10 minutes before 11:00. However, the appellant's witness, Jerome Moseley, gave contradictory evidence. He stated that the appellant left home after 11:00. It was put to Moseley in cross-examination that he left "well" after 11:00, but the estimate Moseley gave was 11:05. All of this merely illustrates how imprecise the evidence was and that it was therefore of little probative value. It follows that Sir Richard's stringent criticism of the judge's failure to

analyse the evidence was in the circumstances misconceived. A detailed analysis of the evidence of the timelines of the complainant and of the appellant on the morning of 12 May 2001 would have proved of no benefit to the appellant's defence; the analysis would have shown that there could have been an overlapping period or window of opportunity around 11:05 for the complainant and appellant to have been together.

[17] In some cases, timelines may be decisive of the matter in issue but in most cases such as this one they will not be. If the timelines demonstrate conclusively that the offence could not have been committed and that the alibi defence is good, it is highly unlikely that the prosecution would proceed with a trial. In the instant case the timelines were not decisive and the members of the jury had to determine not the timelines but the larger issue, whether they believed that the complainant was raped in the appellant's house as she said or whether it was a fabrication as the appellant claimed. The judge correctly directed the members of the jury on what should be the focus of their determination:

> "[T]he simple and central issue for you to determine in this case, is whether Doyle, on the evidence given in this trial, committed the offence of rape".

It follows that there is no merit in this ground of appeal. However, the finding is of great significance because the alibi defence was the foundation of the appellant's case. The defence depended on the appellant's credibility but the appellant's own witness did not support the appellant's testimony.

V. GROUND 3 – CORROBORATION

(a) The ground

[18] A summary of the ground is as follows:

> The judge erred in law when in the course of giving the mandatory warning about the absence of corroboration she failed to do so authoritatively, to sufficiently explain the reasons for the warning, to avoid comments that qualified the warning and to analyse the evidence pointing out the evidence capable of amounting to corroboration and that which was not so capable.

(b) Submissions and discussion

[19] The essence of Sir Richard's submissions was that the warning given by the judge to the jury in relation to acting on the uncorroborated evidence of the complainant was defective in a number of respects. First, objection was taken to the fact that although the members of the jury were told that there was in law no evidence capable of amounting to corroboration, they were also told that whether or not there was in fact corroboration was a matter of fact for them to determine. Secondly, it was contended that the terms of the warning were not full and emphatic. Thirdly, it was submitted that the judge made no evidentiary analysis to distinguish between the evidence capable of amounting to corroboration and that which was not.

[20] Mrs. Babb-Agard reviewed carefully the judge's directions from page 602 to 604 of the record. She pointed out that the judge's directions took account of the guidance given by this Court in ***Woodall (Allan) v. R. (2005) 72 WIR 84***. She explained why there was no merit in the submissions made on behalf of the appellant and submitted that the judge's directions on corroboration were adequate.

[21] We agree with Mrs. Babb-Agard and can dispose of this ground in a summary manner because there is no merit in it. Sir Richard did not take into account the decision in ***Allan Woodall*** which dealt extensively at paragraph ***[38]*** to ***[46]*** with the warning requirements that a judge is obligated to give in the absence of corroboration and which the judge in this case obviously followed. The judge clearly told the jury that in law there was no corroborative evidence and that they should proceed on that basis. She warned the jury of the dangers of convicting in the absence of such evidence and gave reasons for the warning. Although Sir Richard was critical of the reasons given, there is no particular form of words that the judge must use in giving the warning. In a straightforward case such as this, based primarily on the credibility of the parties, it would be wrong to approve a formalistic approach which we are invited to do by counsel for the appellant. In most summations there will be some inaccuracies and directions that could on reflection have been explained with greater clarity and precision but ultimately we are concerned with whether the summation was defective or inadequate as to make the verdict unsafe or unsatisfactory. The circumstances of this case called for no detailed analysis of what evidence was not corroboration but for a clear basic warning to the jury in terms of ***Allan Woodall*** which the judge adequately gave.

VI. GROUNDS 1 AND 4 - RECENT COMPLAINT

(a) The grounds

[22] A summary of grounds 1 and 4, which were dealt with together, is as follows:

> The failure of the judge to advise the jury and spell out the common law on recent complaint was a serious error.

> The Crown having conceded that a recent complaint was not part of its case, the judge erred in admitting evidence (a) from the complainant explaining why she did not make a recent complaint to her mother (b) that the complainant spoke to Sergius [a male member of the congregation] about the matter and (c) from the complainant's mother that Sergius spoke to her about the matter.

(b) Submissions and discussion

[23] The prosecution conceded at the opening of its case that the complainant made no recent complaint. The evidence in relation to this matter can be explained simply. The complainant made no complaint of the alleged occurrence to her mother. The complainant in response to prosecution counsel said that she did not speak to her mother because she knew how her mother would have reacted and did not want her mother to get herself in any trouble with the law. In response to a further question as to whether she spoke to anyone, she stated that she spoke to Sergius Bellus, a 24 year old male member of the congregation. Further questioning on the matter was effectively stopped following an objection by Sir Richard. Sergius was not a witness in the proceedings.

[24] It is in the context of this factual background that we introduce ***section 29*** of the ***Sexual Offences Act, Cap. 154***, which states that in the absence of recent complaint, the judge shall (a) give a warning to the jury that an absence of complaint does not indicate that the allegation of the offence is false; and (b) inform the jury that there may be good reasons why a victim may refrain from making a complaint.

[25] The judge at page 604 to 606 explained to the jury in terms of ***R. v. Lillyman [1896] 2 Q.B. 167 CCR*** that the fact that a complaint was made by the complainant shortly after the alleged occurrence may be given in evidence not as evidence of the facts complained of but as evidence of the consistency of the conduct of the complainant. She pointed out that the date and content of the complainant's conversation with Sergius were unknown and that Sergius was not a witness in the case. She told them that in the circumstances as a matter of law there was no evidence before the court of recent complaint.

[26] Nevertheless, Sir Richard made these two grounds of appeal, unnecessarily in our opinion, into a huge topic. He submitted that the judge (i) did not "explain the importance of recent complaint to the witness's credibility" (ii) "failed to address the common law as it relates to recent complaint" (iii) should have directed the jury that in evaluating the evidence of the complainant and in determining whether to believe her that they could take into account that she made no complaint at the earliest reasonable opportunity and (iv) should not have allowed the complainant to give evidence to explain why she made no complaint to her mother and to give evidence that she spoke to Sergius.

[27] Mrs. Babb-Agard explained the reasons for there being no merit in the submissions. The overriding point in this matter was that there was no evidence of recent complaint in the case; there was never any dispute about that fact and the case proceeded on that basis. The judge did explain the importance of recent complaint to the complainant's credibility when she told the jury, "it would be reasonable to expect that if a female has been sexually violated she would complain about it soon after" (page 606). Secondly, the judge's directions were in terms of the common law as explained in ***Lillyman*** and in terms of the statutory provision according to ***section 29***. Thirdly, the judge did invite the jury to evaluate the evidence. Fourthly, it was proper for the complainant to be allowed to give evidence as to why she did not make a recent complaint in view of the statutory provision that the judge shall inform the jury that there may be a good reason for not making a complaint. Further, counsel took no objection to the questions that resulted in the answers from the complainant. In any event those answers were not prejudicial to the appellant but may even have been favourable to his case because the jury may have formed the view that the complainant gave no good reason why she did not make an early complaint to her mother but instead spoke to a young male member of the congregation at an unspecified date.

[28] The real complaint of counsel seems to be that he would have wished the judge to give an elaborate direction to the jury suggesting that the complainant's case was not to be believed because she had made no recent complaint (especially to her mother) as one would normally expect a young girl to do. However, as stated in ***Suresh v. R. (1998) 158 ALR 145*** at ***147*** HC Australia, "the assumption that the victim of a sexual assault will complain at the first reasonable opportunity is an assumption of doubtful validity, particularly in cases of child sexual assault". In our view the judge gave a balanced and restrained direction in terms of ***section 29*** which deals specifically with the situation where there is an absence of complaint as in this case. It was for defence counsel to try to impugn the credibility of the witness on the basis that there was no evidence of recent complaint which he ably did in his address to the jury at page 544 to 548 of the record. This, however, was not the function of the judge. It follows that we do not find any merit in these two grounds of appeal.

VII. <u>GROUND 6 – EVIDENCE OF COLEEN BELLE</u>

(a) The ground

[29] A summary of ground 6 is as follows:

> The judge failed to make a prompt ruling on the challenges to the evidence of Colleen Belle and thereby allowed grossly prejudicial and irrelevant material to linger in the minds of the jury.

(b) Submissions and discussion

[30] Mrs. Belle was a witness for the defence. She was a minister of the church and had responsibility for working with the youth at the time of the incident. The essence of her evidence was that she kept notes on the complainant and that she had to speak to her on more than one occasion for becoming too friendly with an older male member of the congregation. It therefore seems that the sole purpose of her evidence was to attempt to show that the complainant was precocious. It was in this context that she was cross-examined by the prosecution about a charge against her of criminal deception in relation to a cheque but the charge was not proceeded with and Mrs. Belle had no convictions. There was a very late objection to the cross-examination by defence counsel and the judge allowed the same to continue on the basis that it went to the credibility of the witness.

[31] The cross-examination and admission of evidence on a charge of dishonesty in the circumstances of this case was plainly wrong; its sole purpose seems to have been to prejudice the jury against the witness as a person. The questions in relation to the charge were neither relevant to the issue before the court nor to the credibility of the witness. This was a case of the cross-examination of a defence witness in relation to a criminal charge against the witness. The position is comparable to cross-examination of an accused in relation to a criminal charge against the accused. The House of Lords held that it was not generally permissible to cross-examine an accused on a charge that had resulted in an acquittal: ***Maxwell v. Director of Public Prosecutions (1934) 24 Cr.App.R. 152***. The reasons for this were stated by ***Viscount Sankey LC*** at page ***172***:

> "The mere fact that a man has been charged with an offence is no proof that he committed the offence. Such a fact is, therefore, irrelevant; it goes neither to show that the prisoner did the acts for which he is actually being tried nor does it go to his credibility as a witness. Such questions must, therefore, be excluded…because…they are likely to lead the minds of the jury astray into false issues; not merely do they tend to introduce suspicion as if it were evidence, but they tend to distract the jury from the true issue, namely, whether the prisoner in fact committed the offence on which he is actually standing his trial. It is of utmost importance for a fair trial that the evidence should be *prima facie* limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be strictly confined."

Furthermore, the judge has discretion to exclude evidence which is of no probative value: ***section 114*** of the ***Evidence Act, Cap. 121***

[32] Counsel for the appellant also complained of a second challenge in relation to the cross-examination of Mrs. Belle. She was cross-examined as to whether the appellant was paying rent for an apartment for the complainant's older sister while she was purporting to be living at Mrs. Belle. She said she knew nothing about the matter but it had not been put to the appellant when he was cross-examined. However, the judge did warn the jury to place no value on that line of questioning and to disregard it.

[33] The matters on which Mrs. Belle were cross-examined did not relate to the determination of the issue that had to be decided; the guilt or innocence of the appellant. Even if the jury formed an unfavourable view of the witness because of the cross-examination her evidence was of no probative value. It follows that this ground of appeal has no impact on the safety of the conviction.

VIII. GROUND 8 – FILE ON COMPLAINANT

(a) The ground

[34] A summary of ground 8 is as follows:

> The judge gave contradictory directions with respect to the circumstances in which and the time when the file on the complainant was created by the church and erred in law in inviting the jury to consider if the file was fabricated.

(b) Discussion

[35] The church kept a file on the complainant (and other church members). Prosecution counsel at the trial suggested to the defendant that this was a fraudulent file concocted by him and Mrs. Belle for the purpose of the defence. Whether or not the file was fabricated it contained no probative evidence in relation to the offence. We cannot therefore agree with counsel for the appellant that the presentation of the file supported by the testimony of Mrs. Belle was a central part of the defence. We are of the view that nothing in the file could have assisted the jury in determining whether the appellant raped the complainant. This ground could not therefore have affected the issue which the jury had to determine.

IX. GROUNDS 2 AND 14 – CONDUCT OF PROSECUTION

(a) The grounds

[36] A summary of grounds 2 and 14, which were dealt with together, is as follows:

The cross-examination of the accused was aggressive, inflammatory, disparaging and abusive. The impact was so gross that the trial was unfair.

The closing address to the jury by the prosecutor was not characterised by the moderation and restraint befitting a minister of justice. This was so improper as to prejudice the accused and bring into question the fairness of the trial.

(b) Submissions and discussion

[37] Sir Richard examined these two grounds of appeal at great length in his written submissions. However, we can deal briefly with the submissions because we are of the view that the grounds do not affect the manner in which the appeal should be disposed. The complaint in relation to the cross-examination is that the appellant was cross-examined on matters irrelevant to the offence, the whole purpose of which was to disparage the appellant in the eyes of the jury and that the judge exercised no control over that line of questioning. The topics identified by counsel on which the appellant was cross-examined and which had no evidential bearing on the matters to be determined by the jury were listed as follows: the appellant's educational background; whether his family arrangements were a proper example for the church; his recall and understanding of biblical passages; his religious beliefs; an injunction obtained against the church; prophecies made by the appellant; and whether the appellant's involvement in aid relief was fraudulent.

[38] With regard to the prosecution's closing address, counsel alleges that it evinced hostility to and adopted a derisory attitude towards the appellant, his defence, and defence counsel without any intervention by the judge to ensure a fair trial. Counsel set out the passages complained of and cited the leading authority on the matter which is binding on this Court, ***Randall (Barry) v. R. (2002) 60 WIR 103***.

[39] The respondent's skeleton argument and Mr. Watt's oral submissions were that the cross-examination was in response to the evidence given by the appellant and went to the appellant's credibility which was the key issue for the jury to determine. Further, it was submitted that the frequent interruptions by defence counsel was merely a tactic to derail the proceedings. In relation to the closing address, great objection was taken to the allegations made against prosecution counsel especially in view of the nature of the defence case which was aimed at portraying the complainant as a conniving, dishonest, promiscuous, out-of-control school child who could not be accepted as a witness of truth. It was the respondent's contention that in the circumstances the Crown had a duty to refute those allegations and to express its opinion in the strongest possible terms on issues which went directly to the character and credibility of the appellant.

[40] Although we have not set them out and discussed them, we have given full consideration to the appellant's complaints and examined the authorities relied on in support of the grounds. The test that we should apply in determining the merits of these grounds is to be found in ***Barry Randall,*** a Privy Council decision in an appeal from the Cayman Islands. ***Lord Bingham of Cornhill*** formulated the approach at paragraph ***[29]*** of the judgment as follows:

> "The crucial issue in the present appeal is whether there were such departures from good practice in the course of the appellant's trial as to deny him the substance of a fair trial…[Whether] the appellant's complaints…taken together, did [or did] not inhibit the presentation of the defence case and distract the attention of the jury from the crucial issues they had to decide."

As regrettable as some of the matters complained of were, they have to be considered in the context of the trial as a whole; they were not such as to deny the appellant a fair trial or to render the verdict unsafe or unsatisfactory.

X. GROUND 13 – CONDUCT OF FOREMAN

(a) The ground

[41] A summary of ground 13 is as follows:

The display of disapproval by the foreman of the jury resulting from the behaviour of a member of the defence team was enough to give any reasonable onlooker the impression that the foreman was hostile to the defence. The failure of the judge to dismiss him from the jury tainted the trial with bias.

(b) Submissions and discussion

[42] The foreman of the jury by his body language appears to have given the impression to junior counsel for the defence that he disapproved of the manner in which the complainant was cross-examined. With the approval of counsel, the judge carried out an investigation of the matter by hearing evidence from the foreman in the absence of the other members of the jury. The foreman admitted that he gesticulated once in response to senior defence counsel being "very argumentative". Two marshals denied seeing the foreman gesticulating throughout the cross-examination of the complainant as alleged but one of the marshals did see him make a gesture. The judge did not see the foreman make any gesture. The judge ordered the trial to continue.

[43] Sir Richard was critical of the judge's handling of the matter. He submitted that the foreman should have been discharged from the jury. A judge has power to discharge the jury where any misconduct or irregularity or prejudicial

matter arises in the course of the trial: ***section 36*** of the ***Juries Act, Cap. 115B.*** The cases on bias and fair trial rights were prayed in aid by the appellant. We cannot agree with the submissions. It is our view that the incident was blown out of all proportion and elevated, without justification, into a trial error. The judge properly applied the test for apparent bias as set out in ***In re Medicaments and Related Classes of Goods (No. 2) [2001] 1 WLR 700*** by ***Lord Phillips of Worth Travers MR*** at ***paragraph 85*** and approved in ***Porter v. Margill [2002] 2 AC 357*** by ***Lord Hope of Craighead*** at ***paragraphs 102*** and ***103***. The position is that "the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

[44] In an Australian murder trial a juror arranged for flowers to be given to the victim's mother: ***Webb v. R. (1994) 181 CLR 41***. The High Court of Australia formulated the following test to determine whether the juror should be discharged, per ***Mason CJ*** at ***page 53***:

> "[T]he test to be applied in this country for determining whether an irregular incident involving a juror warrants or warranted the discharge of the juror or, in some cases, the jury is whether the incident is such that, notwithstanding the proposed or actual warning of the trial judge, it gives rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the juror or jury has not discharged or will not discharge its task impartially."

It was held that the judge had properly ordered the trial to proceed. Similarly, in the instant case, we agree with Mr. Watts' submission that the judge acted correctly in not discharging the foreman.

XI. GROUND 12 – CONSENT AND RAPE

(a) The ground

[45] A summary of the ground is as follows:

> The accused was charged with rape under section 3(1) of the Sexual Offences Act, Cap. 154 and consent was an issue in dispute even though the prosecutrix was only 13 years old at the time of the offence. The judge erred in law in advising the jury that consent was not an issue thus withdrawing that issue from them.

(b) The statutory framework

[46] There are three distinct offences under the ***Sexual Offences Act,*** of having sexual intercourse with a female: ***section 3***, rape; ***section 4***, sexual intercourse with a person under 14; and ***section 5***, sexual intercourse with a person between 14 and 16. There is also the offence of indecent assault under ***section 11*** where there is no sexual intercourse. The statutory provisions of each offence are as follows:

Section 3 - Rape

> "3.(1) Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the intercourse or is reckless as to whether the other person consents to the intercourse is guilty of the offence of rape and is liable on conviction on indictment to imprisonment for life."

Section 4 - Sexual Intercourse with person under 14

> "4.(1) Where a person has sexual intercourse with another who is not the other's spouse and who is under the age of 14, that person is guilty of an offence whether the other person consented to the intercourse and whether at the time of the intercourse the person believed the other to be over 14 years of age, and is liable on conviction on indictment to imprisonment for life.
>
> (2) …"

Section 5 - Sexual intercourse with person between 14 and 16

> "5.(1) Where a person has sexual intercourse with another with the other's consent and that other person has attained the age of 14 but has not yet attained the age of 16 that person is guilty of an offence and is liable on conviction on indictment to imprisonment for a term of 10 years.
>
> (2) …"

Section 11 - Indecent assault

> "11.(1) A person who indecently assaults another is guilty of an offence and is liable on conviction on indictment to imprisonment for 5 years.
>
> (2) A person under the age of 16 years cannot in law give any consent which would prevent an act being an assault for the purposes of this section.
>
> (3) In this section "indecent assault" means an assault accompanied by words or circumstances indicating an indecent intention."

[47] ***Section 3*** provides that the statutory definition of rape is sexual intercourse by a person with another person without the consent of that other person and is punishable with life imprisonment. There is no reference to the age of the complainant. ***Section 4*** outlines what is referred to as "statutory rape"; i.e. sexual intercourse by a person with another person who is under the age of 14. Under this section, whether or not, that person consents is an offence punishable with life imprisonment. ***Section 5*** provides that sexual intercourse by a person with another person who is aged between 14 and 16 is an offence punishable with imprisonment for 10 years even where that person has given consent.

[48] In summary, therefore, consent is a defence to a charge of rape under ***section 3*** of a person of any age. However, consent is not a defence to a charge of sexual intercourse with a person under the age of 14 under ***section 4*** as the law does not permit such a young person to give consent. The punishment under both sections is life imprisonment. It is therefore not clear why the appellant was charged under ***section 3*** rather than ***section 4***, the prosecution thereby taking upon itself the additional burden under ***section 3*** of having to prove that the complainant did not consent. In the case of a complainant between 14 and 16 years of age, though she can consent, the defendant will still be guilty of an offence under ***section 5*** but the maximum punishment is reduced to 10 years' imprisonment.

(c) The judge's directions

[49] Sir Richard submitted that the effect of the judge's summation was to withdraw from the jury's consideration the issue of consent because she told the jury that the complainant could not consent to intercourse. Counsel stated that "the net result is that the issue of consent, though a live one in the trial was not identified to the jury as a question for their consideration and determination".

[50] In the light of these submissions, it is necessary for us to examine the precise directions that the judge gave the jury on pages 601 and 602 of the record. The judge first reminded the jury of the charge against the appellant which included the wording that the complainant did not consent. Secondly, she read ***section 3*** which makes reference to intercourse without consent. Thirdly, she said that the prosecution must prove that the penetration was done without the consent of the complainant. Fourthly, she reminded the jury that the complainant said that she never consented to intercourse with the appellant. Up to this point the directions were in order.

[51] Regrettably, immediately thereafter, the judge made misdirection number one when she said:

> "At the time of the commission of the alleged offence she was 13 years of age and incapable in law of giving her consent to sexual intercourse."

That statement would have been correct if the appellant had been charged with statutory rape under ***section 4*** but it was not accurate in relation to the charge of rape under ***section 3***. The judge then addressed the jury on the statutory meaning of sexual intercourse. Regrettably, she fell into error again when she repeated the misdirection by telling the jury:

> "I have told you as a matter of law, that as a 13 year old girl she could not give her consent to such an act".

[52] In the next sentence the judge implied that the *actus reus* (the criminal act) was sufficient in this case to prove rape and thereby made misdirection number two when she said:

> "Should you find that he had sex with her, then you will have no difficulty in finding that a rape occurred."

It follows that correct directions on consent were interspersed with incorrect ones.

(d) The law on consent

[53] A simple explanation of the law on consent is to be found in the case of ***R. v. Harling [1938] 1 All ER 307***

CCA in which the headnote states:

> "Where the charge is one of rape, it is necessary in every case that the prosecution should prove that the prosecutrix (whether under the age of 16 or not) did not consent."

Humphreys J delivering the judgment of the court in which ***Lord Hewart LCJ*** presided, stated at page ***308***:

> "It is desirable for this court to re-state the law, which is not subject to doubt. Upon a charge of carnal knowledge of a girl under 16, while such a girl is perfectly capable of consenting, and, as everyone who tries these cases knows, frequently does consent, to sexual intercourse, such consent affords no defence to the accused man. **Where, however, the charge is one of rape, it is necessary that the prosecution should prove that the girl or woman did not consent, and that the crime was committed against her will…in every charge of rape the fact of non-consent must be proved to the satisfaction of the jury**." (Emphasis added.)

[54] We bear in mind the fact that in this case there was evidence that the complainant physically resisted the appellant by pushing him off and this may have been enough proof by the prosecution to show absence of consent. ***Lord Parker CJ*** applied ***Harling*** in ***R. v. Howard [1965] 3 All E.R. 684 C.C.A***. and stated that:

> "[I]n the case of a girl under sixteen, the prosecution, in order to prove rape, must prove either that she physically resisted, or if she did not, that her understanding and knowledge was such that she was not in a position to decide whether to consent or resist."

(e) Submissions and discussion

[55] Mrs. Babb-Agard, who did not appear for the Crown at the trial, conceded that there was misdirection in the statement that absence of consent did not have to be proved on a charge of rape because of the complainant's age. However, she submitted that because consent was not raised as a defence, it was not an issue for the jury to determine. The appellant's defence was that he never had sexual intercourse with the respondent. In the circumstances, counsel contended that the misdirection did not impact on the safety of the conviction. We cannot accede to that submission.

[56] Consent is an essential ingredient of the offence of rape. If the appellant said that he had no contact with the complainant and the jury formed the view that he was lying and that he did have sexual connection, the jury still had to consider the matter further and be sure beyond reasonable doubt that the connection was non-consensual. Proof of the *actus reus* alone was not sufficient to justify a conviction; the prosecution had to prove the absence of consent.

[57] In the circumstances of this case and in spite of the evidence of some resistance on the part of the complainant, it was essential that the jury was specifically directed to give careful consideration to whether or not there was an absence of consent. The jury needed to consider, following accurate directions, the specific facts and circumstances that were relevant to whether the complainant consented. Sir Richard identified some of these facts and circumstances: the complainant remained in the appellant's house and apparently made no attempt to escape (in the colourful language of counsel, "she made no hue and cry"); she accepted the money and the sweets; she made no recent complaint; she did not tell anyone immediately of the incident as the appellant had urged her but in early August 2001 first told a male church member and not her mother about the incident; a complaint was not made to the police until 2 September 2001(over three months after the incident); the appellant was not interviewed by the police until 5 September 2001 and the complainant was not examined by the doctor until 7 September 2001.

[58] The jury needed to consider these matters in the context of the necessity of the prosecution to establish the absence of consent on the part of the complainant. If follows that if the members of the jury were misdirected on a material ingredient of the offence then their verdict may not be safe or satisfactory. Even if the verdict may have been the same had the jury been properly directed, we cannot be sure that no substantial miscarriage of justice has occurred. Under our criminal justice system any doubt in this area must be resolved in favour of the appellant. We therefore find that there is merit in this ground of appeal.

(f) Replacement of verdict and sentence

[59] The ***Criminal Appeal Act, Cap. 113A*** gives this Court power in ***section 5*** to replace the jury's guilty verdict with one for another offence and to pass a sentence in substitution as follows:

> "Where an appellant has been convicted of an offence and **the jury could on the indictment have found him guilty of some other offence** and **on the finding of the jury it appears to the Court that the jury must have been satisfied of the facts that proved the appellant to be guilty of that other offence**, **the Court may**, **instead of allowing or dismissing the appeal**, **replace the verdict** found by the jury by a verdict of guilty of that other offence, **and** thereupon, if the sentence is not one of greater severity, **pass** such **sentence in substitution** for the sentence passed at the trial as is authorised by law for that other offence." (Emphasis added.)

[60] As explained in ***Archbold 2010*** at ***7-106*** and ***7-107***, before the power to replace the verdict found by the jury by a verdict of guilty of another offence is exercised, two conditions must be fulfilled: first, the jury must have been able on the indictment to have found the convicted person guilty of some other offence and secondly, the jury must have been satisfied of the facts which proved the convicted person guilty of the other offence.

[61] In relation to the first condition, Mrs. Babb-Agard drew our attention to ***section 36*** of the ***Criminal Appeal Act*** which specifically provides that the jury could on the indictment have found the appellant guilty of indecent assault. ***Section 36(1)*** provides for a finding of guilty of a lesser offence for the offence of rape, as follows:

> "If, upon the trial of any indictment for the **offence of rape** under section 3 the jury is satisfied that the accused is guilty of a lesser offence under this Act, but is not satisfied that the accused person is guilty of the offence charged in the indictment or of an attempt to commit the same, then and in every such case the jury may acquit the accused of that offence and find him guilty of a lesser offence under this Act; and the accused is liable to be punished in the same manner as if he had been convicted upon an indictment for the lesser offence or for the **offence of indecent assault**." (Emphasis added.)

[62] The second condition is fulfilled if it appears to the Court that the jury must have been satisfied of the facts that proved the appellant to be guilty of indecent assault. There is clear authority that under ***section 5*** of the ***Criminal Appeal Act*** the Court can replace the verdict of guilty of rape by a verdict of guilty of indecent assault contrary to ***section 11*** of the ***Sexual Offences Act***. In ***R. v. Hodgson and others [1973] 2 All ER 552*** the English Court of Appeal held at page ***557*** that:

> "[A] charge of rape of necessity involves two of the same constituent elements that are also involved in the charge of indecent assault – an assault and indecency. Every charge of rape therefore as it were contains within itself the essential ingredients of indecent assault."

[63] ***Hodgson*** has been described in a recent Court of Appeal decision as having for long been "the classic example of the workings of [the equivalent to ***section 5*** above]": ***R. v. Timmins [2006] 1 WLR 756*** at paragraph ***27***. Even before ***Hodgson*** it was settled law that the act of intercourse is sufficient to amount to an indecent assault. The Court of Appeal stated in ***R. v. McCormack [1969] 3 All ER 370*** at page ***373***:

> "The learned deputy chairman took the view – and we think he was absolutely right – that the indictment alleging an act of unlawful sexual intercourse with a girl under the age of 16 necessarily included an allegation of an indecent assault on that same girl."

[64] We should add that the Court cannot replace the verdict of guilty of rape by a verdict of guilty of sexual intercourse with a person under the age of 14 contrary to ***section 4*** of the ***Sexual Offences Act***. The reason is explained in ***Hodgson*** at pages ***555*** and ***556***. The age of a complainant is not an essential constituent of the offence of rape but it is obviously of the offence of sexual intercourse with a person under the age of 14. Indecent assault is a necessary component of rape whereas the age of the complainant is not. It follows that an offence that requires the complainant to be a specific age cannot be a component of the offence of rape which is silent on the age of the complainant.

[65] Nevertheless, the power to replace the verdict with that for another offence is discretionary ("the Court may") and the discretion is to be exercised in the light of what would be just in all the circumstances. In ***R. v. Peterson [1997] Crim.L.R. 339*** the English Court of Appeal held briefly without elaborating that:

> "[T]he discretion was a wide one and as such it would be inappropriate to substitute a conviction for a variety of reasons, for instance where it would bring about injustice or prejudice of some kind, or where it would amount to an abuse of process. However, the discretion should be exercised on the procedural and evidential history of the case and not the personal circumstances of the applicant."

[66] Sir Richard submitted that the instant case was not one for the exercise of the Court's discretion to replace the verdict of rape with one of indecent assault. Counsel relied on what the English Court of Appeal described as highly relevant considerations in ***R. v. Graham and others [1997] 1 Cr.App.R. 302 CA*** where ***Lord Bingham LCJ*** said at page ***313***:

> "The fact that the jury did not have a proper direction as to [the substituted offence] is a highly relevant consideration, as is the question whether there are reasonable grounds for concluding that the conduct of the defence would have been materially affected if the appellant had been charged with [the substituted offence]."

[67] With regard to the first consideration that the jury did not receive a direction on indecent assault, this fact is not

decisive against the exercise of the discretion. In ***R. v. Caslin [1960] 45 Cr.App.R. 47 CCA*** at ***55***, ***Lord Parker LCJ*** said:

> "[T]he jurisdiction of this court does not depend upon whether the judge did in fact sum up on the alternative basis, but upon whether the jury must have been satisfied of facts which proved him guilty of that other offence. No doubt, therefore, this is a jurisdiction which must be exercised with great caution, and the fact that the jury never had a proper direction as to the alternative offence is a very relevant consideration."

It was held in that case where the appellant was convicted of larceny that the jury must have been satisfied of the facts which proved the appellant guilty of obtaining money by false pretences.

[68] With regard to the second consideration that the conduct of the defence would have been materially affected if the appellant had been charged with indecent assault instead of rape, it is difficult to appreciate this contention in view of the fact that the appellant denied any connection with the complainant. It would therefore have made no difference to such a defence whether the charge was rape or indecent assault.

[69] Finally, counsel argued strongly that the evidence against the appellant in the instant case was "marginal" while the evidence in the cases in which the discretion had been exercised to replace the verdict found by the jury was "overwhelming". In an effort to persuade the Court not to exercise the discretion to replace the verdict but to quash the conviction, counsel relied heavily on ***R. v. Deacon [1973] 57 Cr. App. R. 688 CA***. Deacon was convicted for the murder of his brother-in-law. His wife gave evidence but she was not a competent witness. The English Court of Appeal held that:

> "[H]er evidence was of such weight and importance that the Court could not say that the verdict would have been the same if either she had not been called as a witness or the jury had been directed to exclude her evidence...although, in the opinion of the Court, the jury, if properly instructed, would at least have returned a verdict of Guilty of manslaughter, it was not possible to substitute that verdict...because the Court was empowered to substitute an alternative verdict only if it appeared to the Court *from the finding of the jury* that the facts essential to establish the alternative offence were proved. The [statutory provision] did not authorise the Court to act on the footing that it was satisfied that the jury would have brought in the alternative verdict, if properly instructed."

[70] ***Lord Widgery LCJ*** explained why the discretion could not be exercised to replace the verdict of murder with one of manslaughter at page ***694***:

> "The improper admission of the wife's evidence seems to us to colour the entire findings of the jury, and we are unable to say that the jury found facts appropriate to a verdict of manslaughter, except on the footing that they received support in their finding from the evidence of the wife."

In the instant case the jury found facts appropriate to a verdict of indecent assault. Those facts were not based on the improper admission of evidence of a material witness as in ***Deacon***. The circumstances in ***Deacon*** are therefore distinguishable from those in this case.

[71] The correct approach will be dictated by what the justice of the case demands. In ***Hodgson and others*** appeals against convictions for indecent assault following rape charges were dismissed and it was held that the judge had properly left the alternative charge of indecent assault to the jury. ***Roskill LJ*** stated at page ***557***:

> "It was also said that as a matter of practice it is unjust, where the real charge is rape, to leave to the jury an alternative charge of indecent assault on the ground that the girl concerned was incapable of consent because she was under [age]. In the view of this court, it is impossible to generalise. No two cases are precisely alike. In some cases one can imagine circumstances where it might be said to be unfair that if a jury were to acquit on the rape charge on the ground of consent, that the accused should be put in peril on an indecent assault charge. But there are undoubtedly other cases, and in the view of this court the present is without question such a case, in which the overall interests of justice require that a charge of indecent assault should be left to the jury as what is sometimes called a 'built in' alternative to the rape charge."

[72] We are cognisant of the fact that the only real evidence against the appellant was that of the complainant. However, in sexual offence cases the material evidence is invariably limited to that of the parties involved. We have taken into account the grounds, submissions and misdirection on consent and concluded that a verdict of guilty of indecent assault would not have been unsafe or unsatisfactory. It is in the public interest, particularly for the victims of sexual crimes, that the perpetrators be convicted and punished. We therefore hold that it is just in the circumstances of this case to exercise our discretion to replace a verdict of guilty of indecent assault for that of rape.

(f) Assistance on the law from counsel

[73] Apart from the misdirection that consent was not necessary to be proved on a rape charge because the complainant was under 14, the judge conducted the trial fairly. In this connection we should mention that a judge should reasonably be able to rely on counsel for assistance on the law: this topic is discussed in ***Archbold 2010*** at ***4-371*** and ***4-372***.

[74] In his opening address prosecution counsel stated at page 36 of the record:

> "For the purposes of this trial, Mr. Foreman and your members, it will be the evidence of the prosecution that the complainant in this case, was aged 13 years at the time, and by virtue of law she cannot consent to sexual intercourse. More on that later."

That statement would have been accurate if the appellant had been charged under ***section 4*** but not in relation to a charge of rape.

[75] At the end of her summation the judge invited counsel, in accordance with modern practice, to indicate if they wished anything further said in the summation. The following exchange followed at page 664 of the record:

> "**The Court**: Mr. Leacock, is there anything that you would like me to put to the jury that I have not put?
>
> **Mr. Leacock**: No, My Lady.
>
> **The Court**: Sir Richard, is there anything that you would wish me to --
>
> **Sir Richard**: No, please, ma'am."

The Crown and the appellant were both represented by senior and experienced counsel. They themselves, it would appear, did not appreciate at the time that the judge had misdirected the jury on consent and failed to take up the judge's invitation.

[76] The common law obligation of prosecution counsel to assist the judge on law is stated in the English Court of Appeal decision of ***R. v. McVey [1988] Crim.L.R. 127***:

> "[I]t is the duty of counsel for the Crown to, if I may use the colloquialism, keep an eye on the Judge, to listen to the summing up and to make notes, so far as he can, that the essential ingredients of a summing up are in fact put before a jury. The judge is entitled to rely to an extent on that assistance being made available to him."

In another Court of Appeal decision, ***R. v. Donoghue [1987] Crim.L.R. 60*** it was stated that:

> "It would be helpful if prosecution counsel were to make a check-list of the directions on the law which he considered the judge ought to give, and to draw to the attention of the judge any failure on his part to give an essential direction before the jury retired."

[77] ***Archbold*** suggests that there is no corresponding obligation on defence counsel to assist the judge based on the statement of ***James LJ*** in the case of ***R. v. Cocks (1976) 63 Cr.App.R. 79*** at ***82 CA***:

> "…defending counsel owes a duty to his client and it is not his duty to correct the judge if a judge has gone wrong. On the other hand if prosecuting counsel, listening to the summing-up appreciates that there has been some misdirection of law or some misdirection of fact then prosecuting counsel has a right, if he thinks fit, to raise the matter with the judge and so obtain any correction necessary before the jury retire."

However, the view has also been expressed in the English Court of Appeal that it is commendable and desirable for defence counsel to draw the judge's attention to misdirection and to seek to have any alleged error corrected, rather than stay silent with a view to raising the matter on appeal.

XII. GROUND 15 – VERDICT UNSAFE OR UNSATISFACTORY

[78] Sir Richard made a formidable number of submissions in an attempt to demonstrate that the appellant did not have a fair trial. None of the grounds of appeal had the effect of rendering the verdict unsafe except for the misdirection that it was not necessary for the prosecution to prove consent in rape of a minor. It is counsel's submission that the "multiple errors" in the directions "add up" to a formidable case for allowing the appeal. We have therefore considered the grounds not only individually but as a whole and in the light of the said misdirection. We have also borne in mind the fact that the prosecution case depended entirely on the uncorroborated evidence of the complainant and that the verdict turned solely on the credibility of the complainant's evidence.

[79] However, there was nothing esoteric about the facts of this case. The facts were of everyday experience of life, the truth of which a lay mixed jury of nine members would have been well able to determine. The verdict of guilty of rape amounted to acceptance by the jury of the fact that the appellant had indecently assaulted and sexually penetrated the complainant. There was misdirection on the law of consent but in the circumstances of this case the misdirection did not negate the finding by the jury of assault and indecency implicit in the act of rape.

XIII. GROUND 16 - SENTENCE

(a) Indecent assault

[80] The judge sentenced the appellant on the rape conviction. The ground complains that the sentence of 10 years' imprisonment was excessive. This Court has the statutory power to replace the verdict of guilty of rape with a verdict of guilty of indecent assault and to pass such sentence in substitution for the sentence passed at the trial as is authorised for indecent assault. We have to consider the appropriate sentence for the indecent assault.

(b) Custodial sentence – aggravating and mitigating factors

[81] The ***Penal System Reform Act, Cap. 139*** seeks to limit the imposition of a custodial sentence (***section 35(2)***). The Court must be of the opinion that the offence was so serious that only a custodial sentence can be justified (***section 35(2)(a)***) or where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm (***section 35(2)(b)***). The sentencing court having formed the opinion required by ***subsection (2)*** has a duty to state its opinion and give its reasons for reaching its opinion that either or both paragraphs ***(a) and (b)*** of ***subsection (2)*** apply (***subsection (4)(a)***) and explain to the offender its reasons for imposing a custodial sentence (***subsection (4)(b)***). The recent decision of the Caribbean Court of Justice (CCJ) in ***R. v. Gittens (2010) 75 WIR 126*** set out and explained ***section 35*** at paragraphs ***[9]*** and ***[11]***. It is clear from the CCJ judgment that a high degree of compliance with the provisions of the ***Act*** will be expected.

[82] We have formed the opinion that ***subsections 35(2)(a) and (b)*** apply to the circumstances of the offence of indecent assault in this case as being so serious that only a custodial sentence can be justified for the offence and that because the offence is a sexual offence only such a sentence would be adequate to protect the public from serious harm from the offender. In forming our opinion we have taken into account the aggravating and mitigating factors: ***sections 37(3)(a)*** and ***39(1).*** The aggravating factors relating to indecent assault include a breach of trust and betrayal of confidence, which the complainant and her mother should have been able to repose in the appellant as the family's pastor. The complainant's young age and vulnerability and the age difference between the parties are further aggravating factors.

[83] The mitigating factors in relation to the offence are that the appellant's conduct against the complainant did not involve abusive physical violence or acts of perversion or sexual depravity. The conduct of the appellant, albeit reprehensible, did not fall into the category of the worst cases of indecent assault. Further, as pointed out by Sir Richard, the complainant's evidence was that she had moved on; she had completed her secondary and tertiary education, she was employed and she was engaged to be married.

[84] In relation to the appellant, he was 32 years of age at the time of the offence (his date of birth is 6 December 1968). The pre-sentence report was favourable to him. He had no convictions and his four character witnesses gave moving testimony on his behalf especially in relation to his 24 years of outstanding service in the Ministry.

(c) Length of sentence

[85] ***Subsections 36(1)(a) and (b)*** of the ***Penal System Reform Act*** state that the custodial sentence shall be for such term as is commensurate with the seriousness of the offence and where the offence is a sexual offence for such longer term as is necessary to protect the public from serious harm. Although not cited to us, a helpful case on the approach that the Court should adopt in imposing sentence is the old English Court of Criminal Appeal case of ***Samuel Harrison (1909) 2 Cr. App. R. 94.*** Harrison and three others were charged with rape, but the prosecutrix, a woman of bad character, was absent at the trial. The judge directed the jury that in the absence of the prosecutrix it would be dangerous to convict the accused of rape or of assault with attempt to rape, but that they could be convicted of an indecent assault. They were so convicted and the judge imposed the maximum sentence of two years' imprisonment with hard labour on each one. On the appeal of Harrison only, it

was held that it was not appropriate to consider that the appellant might have been guilty of rape and that the maximum sentence for indecent assault must be reserved for the worst cases. In reducing the sentence ***Channell J*** said:

> "We are all of the opinion that there was ample evidence of an indecent assault, and that there is no ground for interfering with the verdict…In this case **the** learned **judge**…**was not at liberty to take into consideration that in fact the prisoners might have been guilty of rape**. We think that he must have taken that possibility into consideration…**The maximum sentence must, as presumably the law intended, be reserved for the worst cases**. In this case, also, the prisoners had already been four months in prison. The Court thinks that the sentence ought to be reduced to one of twelve months' imprisonment with hard labour." (Emphasis added.)

[86] We have considered the facts: the offence took place on 12 May 2001, the appellant was not convicted until 31 July 2008, over seven years after, and two more years have elapsed. The appellant was not in custody pending his trial but was on bail until the date of his conviction when he was remanded in custody. One of the appellant's character witnesses who was close to him throughout his ordeal described the seven years awaiting trial "like a time for him in purgatory, seven years of torture". The delay was described as "systemic". Nevertheless we have treated the extensive period awaiting trial as a factor to be taken into account and for which some credit has been given in reduction of sentence. We have also taken into account the delay of three months between conviction and sentence (31 July to 31 October 2008).

(d) Conclusion

[87] We have not been referred to or found any written decision of this Court providing guidance on sentencing for indecent assault. However, after careful consideration of the relevant factors, we are of the opinion that a reasonable sentence to impose on the appellant for indecent assault would be 3 years. We need to emphasise that we have not reduced the appellant's sentence from 10 to 3 years; rather his conviction for rape carrying the maximum sentence of imprisonment for life has been replaced by a conviction for indecent assault carrying a maximum sentence of imprisonment for 5 years.

XIV. DISPOSAL

[88] The Court therefore, in accordance with ***section 5*** of the ***Criminal Appeal Act***, instead of allowing or dismissing the appeal, replaces the verdict found by the jury by a verdict of guilty of indecent assault. A sentence of 3 years' imprisonment is passed in substitution for the sentence passed at the trial. The sentence is to commence from the date of imposition of the original sentence on 31 October 2008.

Justice of Appeal

Justice of Appeal

Justice of Appeal